NO. 47773-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DEREK DOSSANTOS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable John R. Hickman, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

A. ARGUMENT IN REPLY

1. THE PROHIBITIONS ON PLACES WHERE MINORS CONGREGATE FAIL TO MAKE CLEAR WHICH PLACES ARE ACTUALLY PROHIBITED

The State argues that the trial court's inclusion of examples of prohibited places saves the minors-congregate conditions from unconstitutional vagueness. Br. of Resp't at 23-25. But the list given by the trial court is hardly exhaustive. It remains unclear where Dossantos can and cannot go. The provision of some examples does not resolve the vagueness problem.

And the examples themselves are of limited value in clarifying the prohibitive conditions, contrary to the State's claims. As Dossantos argued in the opening brief, while some places are more or less obvious, other examples are not even clearly places where minors typically congregate. Br. of Appellant at 9 (questioning the point at which a restaurant becomes a "Fast-food outlet" and what types of venues and shopping centers qualify as the prohibited "shopping malls" and "theatres" where minors are likely to be found). The State does not respond to this concern but instead quotes State v. Riles, 135 Wn.2d 326, 349, 352, 957 P.2d 655 (1998), abrogated by State v. Sanchez Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010), arguing there the court reasoned "that the condition applied only 'to places where children commonly assemble or congregate' (as opposed to all public places), and

'persons of common intelligence would understand the conditions prohibiting . . . Riles from going to places where children may commonly be found.'" Br. of Resp't at 22. But, generally, children are commonly found in most places adults are, including "bowling alleys, places of worship, hiking trails, buses, trains, grocery stores, swimming pools, restaurants, and so on . . . ." Br. of Appellant at 9. In reality, the challenged conditions potentially prohibit Dossantos from going to all public places, given the risk that minors tend to be present in most of them. Notwithstanding the inclusion of a nonexclusive list of helpful and unhelpful examples, the conditions are not sufficiently definite to allow Dossantos to discern between permissible and impermissible locations.

Because the conditions do not clearly indicate where Dossantos is barred from entering, they also lead to arbitrary enforcement. One of the conditions leaves the prohibition on places "where children congregate" subject to "approv[al] by the Court." CP 355. The State tacitly acknowledges this opens the door to arbitrary results, indicating "clarifying language and an illustrative list of prohibited places" will "remain in effect *unless* defendant goes before the court to seek an exemption." Br. of Resp't at 25 n.7. The State's position that Dossantos would be required to seek advanced approval by the court in order to obtain an exemption "virtually acknowledges that on its face" the conditions "do[] not provide ascertainable standards for

enforcement." State v. Bahl, 164 Wn.2d 739, 758, 193 P.3d 678 (2008). This court should strike the where-minors-congregate conditions from Dossantos's judgment and sentence.

2. PROHIBITIONS ON PORNOGRAPHY AND SEXUALLY EXPLICIT MATERIAL ARE UNCONSTITUTIONALLY VAGUE AND UNRELATED TO DOSSANTOS'S CRIME, AS THE PSCYHOSEXUAL EVALUATION SHOWS

1. The prohibitions are unconstitutionally vague

The State correctly concedes the condition prohibiting the perusal of pornography is unconstitutionally vague. Br. of Resp't at 26-27. But the State incorrectly relies on Bahl to assert that the prohibition on "any sexually explicit materials in any medium" does not suffer from the same unconstitutional vagueness. Br. of Resp't at 27-28.

The Bahl court merely approved of the prohibition on frequenting establishments whose primary business was sexually explicit or erotic material. Bahl, 164 Wn.2d at 758. Because the condition focused on the business purveyors of sexually explicit materials, the court determined the prohibitory condition was sufficiently clear. Id. at 759. The Bahl court did not decide whether the statutory definitions alone provided "sufficient notice (given that Mr. Bahl was not convicted under this statute) . . . ." Id. at 760. The State's reliance on Bahl is thus inapt because Bahl does not control.

More telling is the State's failure to engage in any statutory analysis to support its argument that the definitions of "sexually explicit material" and "sexually explicit conduct" in RCW 9.68.130(2) and RCW 9.68A.011(4) are sufficiently clear to overcome Dossantos's vagueness challenge. As Dossantos asserted, various aspects of the statutory definitions do more to obscure than to clarify. Br. of Appellant at 17-18. The State does not respond to these concerns, indicating it has no response. Because the condition prohibiting perusing or possessing "sexually explicit materials in any medium" does not fairly apprise Dossantos of what material he is allowed to peruse or possess.

Nor does the State cite authority for its position that the condition against "sexually explicit materials in any medium" will not be enforced in an arbitrary manner. The State acknowledges the enforcement of this condition "rests with defendant's sexual deviancy treatment provider," yet it concludes "such a reasonable grant of therapeutic discretion is not void for vagueness on its face." Br. of Resp't at 29. This assertion is contrary to authority that specifies that when a third party "direct[s] what falls within the condition," it "only makes the vagueness problem more apparent since it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement." Bahl, 164 Wn.2d at 758.

The vagueness problem is also particularly apparent here, given that the loose language contained in the psychosexual evaluation report expressly permits arbitrary enforcement. The report states, "Possession and perusal of pornography, as defined by his therapist, should be prohibited. This includes, but is not limited to, Internet content, magazines, books, and X-rated films or videos." CP 401. This prohibits pornography, a term which, as discussed, is entirely subjective and therefore creates an unascertainable prohibition. Bahl, 164 Wn.2d at 755. The prohibition also gives unfettered discretion to treatment providers to define what is and what is not illegal. This only highlights that the prohibition on sexually explicit materials fails to provide necessary standards for enforcement.

The conditions prohibiting Dossantos's perusal and possession of pornography and sexually explicit materials in any medium are unconstitutionally vague.

2. The psychosexual evaluation supports Dossantos's argument that prohibitions on pornography and sexual explicit materials are not crime-related

The State claims the prohibition on sexually explicit materials was crime-related and therefore appropriate under RCW 9.94A.670(3)(b)(v) and RCW 9.94A.670(5)(d). Br. of Resp't at 8-12. The State is mistaken.

RCW 9.94A.670(3)(b)(v) grants authority to impose "crime-related prohibitions and affirmative conditions, which must include, to the extent

known, an identification of specific activities or behaviors that are precursors to the offender's offense cycle, including, but not limited to, activities or behaviors such as viewing or listening to pornography or use of alcohol or controlled substances." RCW 9.94A.670(5)(d) permits the trial court to impose "[s]pecific prohibitions and affirmative conditions relating to the known precursor activities or behaviors identified in the proposed treatment plan under subsection (3)(b)(v) of this section . . . ."

The problem with the State's reliance on the psychosexual evaluation is that Dossantos's viewing or possession of sexually explicit materials was not deemed to be a specific activity or behavior that was a precursor to Dossantos's offense cycle. To be sure, as part of the psychosexual evaluation, Dossantos reported masturbating to "pornographic images of females he views on the Internet at 'Porn Hub,'" and also admitted he viewed "pornographic magazines," "X-rated videos/DVDs," and "pornographic Internet sites," between the ages of 12 and 18. CP 396. But the psychosexual evaluation draws no connection between Dossantos's viewing and possessing pornographic materials and his offense cycle, a connection that is essential under RCW 9.94A.670(3)(b)(v) and 5(d) before imposing crime-related prohibitions or affirmative conduct. CP 390-401. Indeed, the psychosexual evaluation report concluded that, before the charge at issue here, there had been "[n]o prior history of sexually deviant behavior." CP 399. This makes

it very clear that the evaluator did not believe nor did he find that Dossantos's viewing or possession of sexually explicit material contributed in any way to his crime.

The State acknowledges there is no connection between sexually explicit materials and the crime. Br. of Resp't at 11. Yet the State argues that the "ongoing pattern of conduct may reasonably be inferred as occurring before, during, and after the time period defendant molested L.K., and therefore it can [be] inferred that defendant's perusal and possession of pornography/sexually explicit materials relates to the circumstances of his offense." Br. of Resp't at 11. The State does not explain how this can be reasonably inferred though. Without any support in law or fact, the State essentially asserts that the viewing of sexually explicit materials is automatically related to sex offenses. This assertion ignores the language of the pertinent provisions of RCW 9.94A.670 that require activities or behaviors to be precursors to the offense cycle. Because there is no evidence that viewing or possessing pornography or sexually explicit material was a precursor to Dossantos's offense—and because not even the psychosexual evaluator thought so—the prohibitions on pornography and sexually explicit materials in any medium must be stricken from Dossantos's judgment and sentence.

3. THE PROHIBITIONS ON JOINING OR PURUSING PUBLIC SOCIAL WEBSITES, USING SKYPE, AND CALLING SEXUALLY ORIENTED 900 NUMBERS ARE NOT PRECURSOR ACTIVITIES TO THE CRIME AND THEREFORE ARE NOT CRIME-RELATED

The prohibitions on social websites, Skype, and 900 numbers fail for the same reasons the prohibitions on pornography and sexually explicit materials do: these are not "specific activities or behaviors that are precursors to the offender's offense cycle . . . ." RCW 9.94A.670(3)(b)(v).

The State contends that this condition is "a way to compliance with defendant's sex offender treatment requirements. Prohibiting defendant from joining or perusing public social websites and Skyping will ensure defendant is not contacting his victim or other minor children and is part of the recommendation that defendant's relations with the community be closely monitored." Br. of Resp't at 14. The State also asserts that the prohibition on sexually oriented 900 numbers "is part of defendant's sex offender treatment and [the] recommendation that treatment address 'sexually deviant arousal' and identification and disruption of 'deviant behavior patterns.'" Br. of Resp't at 14. The State's contentions are incorrect.

Here again, the psychosexual evaluation report, on which the State relies, does not draw the connections the appellate prosecutor does. The report does not relate Dossantos's internet or telephone activities to the crime. The

report does not once mention Skype or 900 numbers.[1] These activities are thus not related to Dossantos's purported "sexually deviant arousal" and "deviant behavior patterns," and they did not contribute to his crime. Without any connection between the prohibited activities and Dossantos's offense, the trial court lacked authority to impose this prohibitory condition under RCW 9.94A.670 or RCW 9.94A.703. The condition must be stricken.

4. BECAUSE THE TRIAL COURT DID NOT FIND DOSSANTOS HAS A CHEMICAL DEPENDENCY THAT CONTRIBUTED TO HIS OFFENSE, IT LACKED AUTHORITY TO REQUIRE A CHEMICAL DEPENDENCY EVALUATION

Before requiring a chemical dependency evaluation, the trial court must find that the defendant suffers from a chemical dependency and that this chemical dependency contributed to this offense. Br. of Appellant at 23-25; RCW 9.94A.607(1); State v. Kinzle, 181 Wn. App. 774, 786, 326 P.3d 870 (2014); State v. Warnock, 174 Wn. App. 608, 612, 299 P.3d 1173 (2013). By failing to respond to this authority and Dossantos's argument, the State has conceded Dossantos is correct. In re Det. of Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) ("[B]y failing to argue this point, respondents appear to concede it."). Because it did not find chemical dependency contributed to Dossantos's crime, the trial court lacked authority to impose a condition

[1] Indeed, the report indicates Dossantos denied any "telephone sex." CP 396.

requiring Dossantos to undergo a chemical dependency evaluation. This condition must be stricken.

The State contends that this condition was appropriate under RCW 9.94A.670(5), presumably subsection (5)(d), which permits "prohibitions and affirmative conditions relating to the known precursor activities or behaviors identified in the proposed treatment plan under subsection (3)(b)(v) of this section . . . ." Br. of Resp't at 18. The State also posits the condition was allowed under RCW 9.94A.703(3)(c) and (d). Br. of Resp't at 18. Then the State engages in abject conjecture, musing that Dossantos's "admitted drug use in the same year he molested L.K., as well as [his] acknowledgement that his drug problem made him act differently and made recalling the relevant events 'hazy,' demonstrate that defendant's chemical dependency issues were related to the circumstances of his offense." Br. of Resp't at 18. The State's speculation does not create the connection necessary to support a crime-related chemical dependency condition. The psychosexual evaluation did not draw a connection between Dossantos's use of chemical substances and the crime. Thus, for the same reasons discussed in the previous two sections, and the State's conjecture notwithstanding Dossantos's purported chemical dependency is not crime-related. The ordered chemical dependency evaluation exceeded the trial court's authority and must be stricken.

B. CONCLUSION

This court should strike the challenged conditions from Dossantos's judgment and sentence.

DATED this 28th day of December, 2016.

Respectfully submitted,

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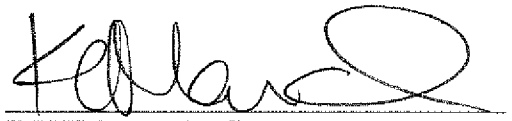

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